

Appl. No. 10/026,241

Amdt. dated March 9, 2004

Reply to Office action of Feb. 19, 2004

**REMARKS/ARGUMENTS**

Reconsideration of the application is requested.

Claims 1 and 3-10 remain in the application. None of the claims have been amended.

Claims 1 and 3-9 are allowed.

Claim 10, according to the Examiner, "is objected to as having been withdrawn from consideration." Applicants understand the objection as responding to their request for a rejoinder. The request for a rejoinder was presented in the last response. We explained that claim 10 was a candidate for a rejoinder because it defined a method of using the product defined in an allowable claim.

The Examiner responded by stating that "claim 10 contains elements not included in allowed claims 1 and 2-9 and, therefore, is seen as a distinct invention." We do not disagree. The statement appears to justify the election/restriction requirement and we never attacked the propriety of the requirement. Instead, we agree that it appears to have been a proper requirement.

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The request presented by applicants, instead, refers to a rejoinder of a (otherwise properly withdrawn) claim into the application. Here, we are guided by the MPEP section entitled "Rejoinder" in 821.04.

**821.04 Rejoinder**

Where product and process claims drawn to independent and distinct inventions are presented in the same application, applicant may be called upon under 35 U.S.C. 121 to elect claims to either the product or process. See MPEP § 806.05(f) and § 806.05(h). The claims to the nonelected invention will be withdrawn from further consideration under 37 CFR 1.142. See MPEP § 809.02(c) and § 821 through § 821.03. However, if applicant elects claims directed to the product, and a product claim is subsequently found allowable, withdrawn process claims which depend from or otherwise include all the limitations of the allowable product claim will be rejoined.

[http://www.uspto.gov/web/offices/pac/mpep/documents/0800\\_821\\_04.htm](http://www.uspto.gov/web/offices/pac/mpep/documents/0800_821_04.htm)

The issue, then, is whether or not the method claim 10 "otherwise includes all the limitations of" claim 1. It is respectfully submitted that it does. In fact, claim 10 even includes more that would be required by claim 1 (as stated by the Examiner). The test for rejoinder, however, is only a one-way test. It does not matter if the method claim contains additional elements.

The Examiner is requested to reconsider in light of the foregoing. Applicants herewith request a rejoinder of claim 10 into the application, its examination on the merits, and its allowance together with claim 1.

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In view of the foregoing, reconsideration and allowance of  
claims 1 and 3-10 are solicited.

Respectfully submitted,



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